VP Nathan & Partners v Subramaniam s/o Govindan Nair & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS P-01–69 OF 2001 AND P-01–70 OF 2001

LOW HOP BING, RAUS SHARIF AND ABU SAMAH JJCA

24 JULY 2009

Labour Law — Employment — Resignation — Employees submitted 'Request for Resignation' letters when told prospects for salary increments, bonuses and partnership in firm slim — Decision to resign discussed at meeting with firm's manager — Whether employees voluntarily resigned or forced to do so — Whether Industrial Court's finding of 'dismissal without just cause or excuse' perverse

The appellants in the above two related appeals were a firm of solicitors ('the firm'). The respondents ('the employees') were formerly employed in the firm's branch in Penang as legal assistants. In early April 1997, the firm's principal partner in Kuala Lumpur was instructed by one of the firm's main clients, Kurnia Insurance Bhd ('Kurnia') that it did not want the employees to handle Kurnia's files. Kurnia's instructions were conveyed to the firm's managing partner in Penang who, in mid-April, had a meeting with the employees concerning the subject. During the meeting the employees asked about their prospects in the firm in view of Kurnia's instructions. The managing partner told them their future increments, bonuses and prospects of getting partnership in the firm would be adversely affected. The employees said if that was the case, they would want to leave the firm. The managing partner informed the employees they need not leave immediately as they would have to give three months' notice of resignation. The employees agreed with his suggestion that they could leave on 31 July 1997. The employees then submitted to the firm their letters, dated 31 July 1997 and captioned 'Request for Resignation' with immediate effect. The managing partner replied, by letters dated 5 August 1997, confirming that the employees had 'agreed to resign by the 31 July 1997'. The employees, however, made a claim for reinstatement under s 20 of the Industrial Relations Act 1967. Their claims were referred to the Industrial Court which ruled that they were dismissed without just cause or excuse ('the dismissal decision') and awarded them back-wages. The firm applied to the High Court for certiorari to quash the decision. The High Court affirmed the dismissal decision of the Industrial Court but quashed the award of back-wages, holding that jurisdictional error had been committed in failing to take into account post-dismissal earnings of

the employees. The firm appealed to the Court of Appeal against the High Court's decision to affirm the dismissal decision.

Held, allowing the appeal with costs here and court below:

(1) In law, the employees had voluntarily resigned and were not dismissed. The High Court's treatment of the question as one of pure facts was an abdication of jurisdiction constituting a jurisdictional error capable of being corrected on appeal (see para 23).

(2) There was no doubt whatsoever that the employees themselves had requested to resign. They were not forced to resign. They were, on the material dates, advocates and solicitors of some 7 years standing and were senior learned members of the Bar. They had expressed their 'Request for Resignation' in their letters explicitly (see para 23).

(3) The High Court dealt with the dismissal decision exclusively as one of pure facts when it clearly revolved around a question of law, which, unlike a finding of facts, was amenable to the High Court's jurisdiction in an application for judicial review (see paras 21 & 22).

[Bahasa Malaysia summary

Perayu-perayu di dalam kedua-dua rayuan yang berkaitan di atas merupakan sebuah firma guaman ('firma tersebut'). Responden-responden ('pekerja-pekerja') sebelumnya telah dilantik di cawangan firma di Pulau Pinang sebagai pembantu perundangan. Pada awal April 1997, rakan kongsi utama firma tersebut di Kuala Lumpur telah diberi arahan oleh salah seorang daripada pelanggan utama firma tersebut, Kurnia Insurance Bhd ('Kurnia') bahawa ia tidak mahu pekerja-pekerja tersebut untuk mengendalikan fail-fail Kurnia. Arahan Kurnia telah disampaikan kepada pengurus perkongsian firma tersebut di Pulau Pinang, yang mana, di pertengahan April, telah menghadiri mesyuarat dengan pekerja-pekerja berkenaan dengan perkara tersebut. Semasa mesyuarat pekerja-pekerja tersebut bertanya tentang prospek mereka di firma melihat kepada arahan Kurnia tersebut. Rakan kongsi urusan memberitahu mereka pertambahan, bonus-bonus dan peluang untuk mendapat perkongsian di dalam firma pada masa hadapan akan terjejas. Pekerja-pekerja tersebut berkata sekiranya kes adalah sedemikian, mereka hendak meninggalkan firma tersebut. Pengurus perkongsian memberitahu pekerja-pekerja tersebut bahawa mereka tidak seharusnya meninggalkan firma serta-merta memandangkan mereka hendaklah memberikan tiga bulan notis perletakan jawatan. Pekerja-pekerja bersetuju dengan cadangan bahawa mereka akan meninggalkan firma pada 31 Julai 1997. Pekerja-pekerja kemudian menyerahkan kepada firma surat-surat mereka bertarikh 31 Julai 1997 dan meletakkan tajuk 'Request for Resignation' dengan efek serta-merta. Pengurus perkongsian membalas, melalui surat-surat bertarikh 5 Ogos 1997, mengesahkan bahawa pekerja-pekerja telah 'agreed to resign by the 31 July

1997'. Pekerja-pekerja tersebut, walau bagaimanapun, membuat tuntutan untuk pengembalian pekerjaan di bawah s 20 Akta Perhubungan Perusahaan 1967. Tuntutan mereka telah dirujuk kepada Mahkamah Perusahaan yang mana memutuskan bahawa mereka telah dipecat tanpa sebab atau alasan adil ('keputusan pemecatan') dan mengawardkan mereka gaji tertunggak. Firma tersebut telah memohon kepada Mahkamah Tinggi untuk certiorari untuk membatalkan keputusan tersebut. Mahkamah Tinggi mengesahkan keputusan pemecatan oleh Mahkamah Perusahaan tetapi telah membatalkan award untuk gaji tertunggak, memutuskan bahawa kesilapan bidang kuasa telah dilakukan apabila gagal untuk mengambilkira pendapatan pekerja-pekerja selepas dipecat. Firma membuat rayuan kepada Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi mengesahkan keputusan pemecatan.

Diputuskan, membenarkan rayuan dengan kos di sini dan di Mahkamah Tinggi:

(1) Dalam undang-undang, pekerja-pekerja tersebut telah meletak jawatan secara sukarela dan bukan dipecat. Pendekatan Mahkamah Tinggi terhadap persoalan tersebut sebagai fakta semata-mata merupakan pelepasan bidang kuasa yang menyebabkan kesilapan bidang kuasa yang boleh dibetulkan semasa rayuan (lihat perenggan 23).

(2) Tidak dapat disangsikan lagi bahawa pekerja-pekerja itu sendiri telah meminta untuk meletak jawatan. Mereka tidak dipaksa untuk meletak jawatan. Mereka, pada tarikh-tarikh material, merupakan peguamcara dan peguambela selama tujuh tahun dan merupakan ahli-ahli kanan Maljlis Peguam yang bijaksana. Mereka telah menyatakan 'Request for Resignation' mereka dengan jelas di dalam surat-surat mereka (lihat perenggan 23).

(3) Mahkamah Tinggi telah mengendalikan keputusan pemecatan secara eksklusif sebagai fakta semata-mata apabila adalah jelas ia berkisar dengan persoalan undang-undang, yang mana, berlawanan dengan dapatan fakta, tertakluk kepada bidang kuasa Mahkamah Tinggi dalam permohonan untuk semakan kehakiman (lihat perenggan 21 & 22).]

Notes

For cases on resignation, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1259–1263.

Cases referred to

Airspace Management Services Sdn Bhd v Col (B) Harbans Singh a/l Chingar Singh [2000] 3 MLJ 714; [2000] 3 AMR 3009, CA (refd)

Mas Golden Boutique Sdn Bhd v Mohd Zain bin Abu [1999] 3 MLJ 20; [1999] 3 CLJ 310, HC (refd)

National Union of Plantation Workers v Kumpulan Jerai Sdn Bhd, Rengam [2000] 2 MLJ 144; [2000] 1 CLJ 681, CA (refd)
Petroliam Nasional Bhd v Nik Ramli bin Nik Hassan [2000] 2 MLJ 272; [2000] 2 CLJ 244, CA (refd)
Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600, CA (refd)
Stanley Ng Peng Hon v AAF Pte Ltd [1979] 1 MLJ 57 (refd)
Stephenson v The London Joint Stock Bank Ltd (1902) 19 TLR 138; 20 TLR 8, CA (refd)

Legislation referred to
Industrial Relations Act 1967 s 20

Appeal from: Application for Judicial Review No 25–44 of 2000 (High Court, Pulau Pinang)

N Sivabalah (E Reena with him) (Shearn Delamore & Co) for the appellant.
Pravin Kaur Jessy (Jessy & Associates) for the respondents.

Low Hop Bing JCA (delivering judgment of the court):

APPEALS

[1] These two related appeals viz CA No P-01–69 of 2001 and P-01–70 of 2001 are lodged by the appellants, a firm of solicitors, ('the firm') against the decision of the Penang High Court in dismissing the firm's application for an order of certiorari to quash the award of the Industrial Court relating to the issue of dismissal without just cause or excuse ('the dismissal award').

[2] The employees commenced employment with the firm's branch in Penang, as legal assistants, drawing a starting salary of RM2,000 per month, on 8 December 1989 and 1 June 1990, respectively.

[3] The employees' duties and responsibilities were primarily in connection with road accident cases and include:

(a) Receiving instructions from clients and applying for all necessary documentation from authorities, securing medical and specialist reports;

(b) Interviewing all relevant persons in connection with the clients' claims;

(c) Corresponding with opposing solicitors and agreeing upon documents;

(d) Attending on clients to agree upon defences or further conduct of the action;

(e) Obtaining instructions from clients for negotiations or further conduct of the actions;

(f) Attending court to litigate the cases up to judgment, updating clients and advising them of the outcome of the trial and merits of appeal; and

(g) Preparing memoranda of appeals, arguing appeals and notifying clients of the outcome.

[4] Sometime in early April 1997, Dato' VP Nathan, the firm's principal partner in Kuala Lumpur, was instructed by Kurnia Insurance Bhd ('Kurnia'), one of the firm's main clients, that Kurnia did not want the employees to handle Kurnia's files.

[5] Dato' Nathan conveyed Kurnia's instructions to the managing partner of the firm's branch in Penang, Mr Paul Manecksha, who then verbally informed the employees of the same.

[6] However, the employees were allowed to continue to attend to the Kurnia as well as non-Kurnia files. When Kurnia discovered that the firm had failed to comply with their instructions, Kurnia was annoyed.

[7] Kurnia repeated the instructions to Dato' Nathan to preclude the employees from handling the Kurnia files. Again Dato' Nathan conveyed the instructions to Mr Manecksha.

[8] On 14 April 1997, Mr Manechsha had a meeting with the employees and informed them that Kurnia had insisted on precluding them from handling the Kurnia files. In the course of discussion, the employees enquired about their prospects in the firm. Mr Manecksha informed them that it would affect them in terms of their future increments and bonuses, with dim prospects of partnership, unless Kurnia reconsidered its decision. The employees said that if that was the situation, they might as well leave the firm and seek employment elsewhere. Mr Manecksha informed the employees that they need not leave immediately as they would have to provide the firm with three months' notice of resignation, and suggested that they could leave on 31 July 1997 to which the employees agreed.

[9] The firm received the employees' letters, which were identical in content, dated 31 July 1997 and captioned 'REQUEST FOR RESIGNATION', with immediate effect. Mr Manecksha replied vide two letters, both dated 5 August 1997, confirming that the employees had 'agreed to resign by the 31 July 1997' (see pp 183–186 of the appeal record).

[10] However, the employees made their claim for reinstatement under s 20 of the Industrial Relations Act 1967. The claims were referred to the Industrial

Court which ruled that the employees were dismissed without just cause or excuse, and awarded backwages to the employees.

[11] The firm then filed an application for judicial review, to quash the entire award of the Industrial Court.

[12] The High Court affirmed the dismissal ('the dismissal decision'), but held that the Industrial Court had committed jurisdictional error in failing to take into account post-dismissal earnings and accordingly quashed the award relating to backwages.

[13] This is the firm's appeal against the dismissal decision of the High Court.

VOLUNTARY RESIGNATION OR DISMISSAL

[14] The firm's learned counsel Mr N Sivabalah (assisted by Ms E Reena) submitted that the High Court failed to appreciate that there was no forced resignation and hence no dismissal, as the employees had resigned voluntarily. *Stanley Ng Peng Hon v AAF Pte Ltd* [1979] 1 MLJ 57 was cited in support.

[15] The employees' learned counsel Ms Pravin Kaur Jessy contended to the contrary ie the employees were forced to resign and hence dismissed without just cause or excuse. Reference was made to, inter alia, *Stanley Ng Peng Hon*.

[16] In our judgment, the question for determination in the instant appeal is: Given the above factual background, did the employees resign voluntarily?

[17] The answer to the above question may be ascertained by an analysis of the common authority.

[18] In *Stanley Ng Peng Hon*, the employee testified that the company's manager came to the employee's office and said, 'Stanley, I have to ask you for your resignation'. The employee asked for reasons but the manager refused to disclose any reason. The manager then handed the employee an envelope and said, 'Stanley, I think you will find everything there'. The employee maintained that he was shocked, and pleaded with the manager, but to no avail. The employee was told to go home in the company's car and return it to the company's service station the next day. The employee claimed that he never had any intention of resigning; that the so-called resignation was a dismissal forced on him, and that in the letter he wrote the next morning, he wrongly used the word 'resignation' instead of 'termination of employment'. The manager, on the other hand, stated that he did not recollect asking the employee for his

resignation, but had mentioned to the employee that it was better for the employee to look for other work which he was more suited. The manager admitted that the employee did ask him specifically what the problems were but the manager declined to answer, because the manager wanted to give the employee the opportunity to resign. He admitted that if the employee had not resigned, he would have dismissed him.

[19] Choor Singh J accepted the employee's version and had no doubt that when the manager asked for the employee's resignation, he was in effect dismissing the employee from his appointment, as it was a polite way of telling the employee that he was being dismissed. The resignation was obtained under compulsion and so there was no resignation in law. The learned judge referred to *Stephenson v The London Joint Stock Bank Ltd* (1902) 19 TLR 138; 20 TLR 8 (CA). In essence, the facts there reveal that the employee entered the service of the bank as clerk. He signed a form of rules and regulations for granting retiring allowances to the officers of the bank. The second rule provided that such officer retiring with the consent of the director should receive an allowance at the rate of one-third of the annual amount of his salary at the time he so retired. Under the fifth rule, no retiring allowance whatever was to be granted to any officer who was dismissed from the service of the bank. The employee had endorsed a promissory note which was made by a Mr Horace Sedger. This fact came to knowledge of the bank, and thereupon the bank called upon the employee for an explanation. The employee stated that he had been promised the sum of £25 by Mr Horace Sedger for endorsing the note, and that he was unaware that Mr Sedger was other than a person of sound financial position. Subsequently, the employee received a letter from the secretary to the bank in regard to the matter of the promissory note. The letter contained the words 'you are required to resign your appointment to the bank'. The employee then wrote to the secretary resigning his appointment, and sought a declaration that he was entitled to a pension from the bank, contending that he had retired and was not dismissed. Wright J found that the bank, holding that the employee had not retired but had been dismissed. On appeal, the English Court of Appeal held that Wright J had come to a perfectly correct decision.

[20] It is abundantly clear to us in *Stanley Ng Peng Hon*; and *Stephenson*, the respective courts had dealt with the question of resignation as a question of law, and not of facts exclusively. Of course, the determination of this question of law must be based on the specific reference to the facts prevailing in each particular case.

[21] Reverting to the dismissal decision of the High Court, which is now subject to the instant appeals, we note that the learned judge had dealt with the

dismissal decision exclusively as one of pure facts. In this regard, the High Court held that:

(a) It is not open for a court of judicial review proceedings to exercise appellate powers: *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600 (CA);

(b) If a judge, to whom an application for an order for certiorari is made, enquires into and disturbs a finding of facts, he is actually exercising appellate functions: *Quah Swee Khoon*;

(c) The finding of facts is outside the High Court's judicial review jurisdiction and the High Court is bound to accept such finding of the Industrial Court: *Airspace Management Services Sdn Bhd v Col (B) Harbans Singh a/l Chingar Singh* [2000] 3 MLJ 714; [2000] 3 AMR 3009 (CA);

(d) It is wrong for the High Court in a supervisory role to substitute its findings of facts when such role is within the province of the Industrial Court: *National Union of Plantation Workers v Kumpulan Jerai Sdn Bhd, Rengam* [2000] 2 MLJ 144; [2000] 1 CLJ 681 (CA);

(e) A finding of fact by the Industrial Court is immunised from judicial review: *Petroliam Nasional Bhd v Nik Ramli bin Nik Hassan* [2000] 2 MLJ 272; [2000] 2 CLJ 244 (CA) (see also *Mas Golden Boutique Sdn Bhd v Mohd Zain bin Abu* [1999] 3 MLJ 20; [1999] 3 CLJ 310).

[22] While we are of the view that the above principles are trite, we must emphasise that the impugned dismissal award of the Industrial Court clearly revolves around a question of law which, unlike a finding of facts, is amenable to the jurisdiction of the High Court in an application for judicial review.

[23] When we refer specifically to the employees' letters which expressly stated their 'REQUEST FOR RESIGNATION', there can be no doubt whatsoever that the employees themselves had requested to resign. They were not forced to resign. It is singularly significant to note that the employees were on the material dates advocates and solicitors of some seven years standing. That is a professional qualification which enables them to accept two qualified persons as chambering students for subsequent admission to the Malaysian Bar. The employees are senior learned members of the Bar. The employees have expressed their 'REQUEST FOR RESIGNATION' in their letters explicitly. We are of the view that in law, the employees had voluntarily resigned and were not dismissed. With the utmost respect, the learned judge's treatment of the question as one of pure facts is an abdication of jurisdiction, constituting a

jurisdiction error which is capable of being corrected on appeal.

CONCLUSION

[24] On the foregoing grounds, we hold that there are merits in these appeals. We therefore set aside the dismissal decision of the High Court and substitute it with an order of certiorari to quash the dismissal award of the Industrial Court. The firm is awarded total costs of RM10,000 here and in the court below. Deposits in the two appeals to the firm on account of the costs.

Appeal allowed with costs here and court below.

Reported by Ashok Kumar